86-188

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

EX PARTE GEORGE M. SIMMONS and
ALAN'S COAL SALES,
Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. May a civil money judgment be obtained against a party in any manner other than by the filing of a civil action and obtaining an adjudication of liability in accordance with the Federal Rules of Civil Procedure?

II. May the Seventh Amendment right to a jury trial be circumvented by seeking a money judgment in a civil contempt proceeding?

III. Is a consent decree enforceable by a contempt proceeding if the decree does not conform to the specificity requirements of Rule 65(d) of the Federal Rules of Civil Procedure?

IV. Does a District Court lack jurisdiction to modify a money judgment more than ten days after it is entered?

LIST OF PARTIES

The parties to this proceeding in the United States Court of Appeals for the Eleventh Circuit were as follows: Harrison Combs, John J. O'Connell and Paul R. Dean, as Trustees of the United Mine Workers of America Health and Retirement Funds, Ryan's Coal Company, Inc., George M. Simmons, and Alan's Coal Sales.

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EX PARTE GEORGE M. SIMMONS and
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

TO THE SUPREME COURT OF THE UNITED STATES: judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on April 2, 1986, affirming in part the orders of the United States District Court for the Northern District of Alabama, which orders held the Petitioners to be in civil contempt, imposed a jail sentence against the Petitioner George M. Simmons and rendered a money judgment against both Petitioners.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit affirming in part the orders of the United States District Court for the Northern District of Alabama is reported in *Harrison Combs, et al. v. Ryan's Coal Company, Inc., et al.*, 785 F.2d 970 (11th Cir. 1986). A copy of this opinion and the order denying the Petitioners' petition for rehearing appear in the Appendix.

The Petitioners, George M. Simmons and Alan's Coal Sales, pray that a writ of certiorari issue to review the

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit rendered its opinion and entered its judgment on April 2, 1986. The Petitioners timely filed a petition for rehearing in the Eleventh Circuit which was overruled on May 8, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), which said statutory provision is believed to confer jurisdiction on this Court.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Constitution of the United States, Amendment VII

In suits at common law, where the value in controversy shall exceed Twenty Dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law.

Constitution of the United States, Amendment V

No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Federal Rules of Civil Procedure, Rule 59

New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore

been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Federal Rules of Civil Procedure, Rule 65(d)

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

STATEMENT OF THE CASE

Prior to March 1985 Ryan's Coal Company, Inc., an Alabama corporation ("Ryan's"), was engaged in mining coal. It had a collective bargaining agreement with the United Mine Workers of America under the terms of which it agreed to make certain payments to the United Mine Workers of America Health and Retirement Fund, the Trustees of which are the Respondents to the petition in this case. Ryan's became delinquent in its payments and the Respondents filed suit against Ryan's in the United States District Court for the Northern District of Alabama on August 9, 1983, to recover the delinquency. The basis for federal jurisdiction in this suit was Section 301 of the Labor-Management Relations Act of 1947 (29 U.S.C. § 185) and Sections 502-515 of the Employee Retirement Income Security Act of 1974 ("ERISA") (29 U.S.C. § 1132).

This suit was settled by a consent judgment entered against Ryan's on January 14, 1985. Under the terms

of the consent judgment Ryan's was found to be indebted to the Respondents in the amount of $492,754.91 and was ordered to make installment payments on this obligation. The consent decree also stated other obligations of Ryan's to be those "set forth" in a collective bargaining agreement attached to the complaint or in "any successor" collective bargaining agreement between the parties and the payment terms of an attached judgment note. Neither Alan's Coal Sales nor George M. Simmons were parties to the collective bargaining agreement, the suit filed by the Respondents, or the consent judgment entered on January 14, 1985.

Ryan's made a payment due under the consent judgment in January 1985 but made no later payment. Because of financial difficulties and a natural disaster Ryan's closed its mining operation in March 1985.

On October 4, 1985, the Respondents instituted a civil contempt proceeding against Ryan's. Also made parties to this contempt proceeding were Alan's Coal Sales, a partnership, ("Alan's") and George M. Simmons, individually. George Simmons was the president of Ryan's, the owner of 80 per cent of its stock, and is a partner in Alan's Coal Sales. Ryan's and Alan's operated separately and maintained separate books and records. Alan's marketed the coal mined by Ryan's pursuant to a written contract between Ryan's and Alan's.

A hearing was held on the contempt petition on November 8, 1985. Following that hearing, on November 13, 1985, the District Court entered an order (Appendix, A33-36) finding Ryan's to be the alter ego of George M. Simmons, finding Alan's to be the "assign and successor" of Ryan's and finding Ryan's, Alan's and George Simmons to be in contempt of the January 14, 1985 con-

sent judgment because the payments required by it had not been made. The three parties were ordered, jointly and severally, to pay to the Respondents the sum of $226,411.73 before November 22, 1985, to post a $500,000.00 bond to secure payment of the balance due under the January 14, 1985 consent judgment, and to pay the Respondents' fees and costs. The order also set a hearing for November 22, 1985, for the determination of the amount of fees and costs, the extent to which Ryan's, Alan's and Simmons had complied with the terms of the November 13 order, and the necessity for "more drastic action" by the Court to coerce compliance. (Appendix, A36).

Neither Ryan's, Alan's, Simmons had paid any part of the $226,411.73 by November 22, 1985. They attempted to obtain a surety bond as ordered but were unable to do so. At the November 22, 1985 hearing George Simmons presented evidence of the inability to obtain the surety bond and financial inability to pay the $226,411.73 previously ordered. Following the hearing the trial court dictated certain findings of fact and conclusions of law into the record (Appendix, A41-47) and on November 25, 1985, entered two orders. The first order directed that George Simmons be incarcerated for a period of twenty-one days (Appendix, A37-38) while the second entered a money judgment in favor of the Respondents and against Ryan's, George Simmons, and Alan's in the amount of $728,395.14.

Ryan's, Alan's and Simmons appealed both the November 13 and the November 25 orders to the United States Court of Appeals for the Eleventh Circuit where the appeals were consolidated. In a decision dated April 2, 1986 (Appendix, A1-32), the Eleventh Circuit found the appeal from the November 13 order was not proper be-

cause it was not a final judgment. The decision reversed the portion of the November 25 order which incarcerated George Simmons and remanded it to the trial court for clarification of the basis for the imprisonment and confirmed all other aspects of the orders appealed from, including the money judgment against Alan's and Simmons in the amount of $728,395.14. (Appendix, A32). Petition for rehearing and suggestion for en banc consideration was denied by the Eleventh Circuit on May 8, 1986. (Appendix, A50-51).

ARGUMENT

I.

May a civil money judgment be obtained against a party in any manner other than by the filing of a civil action and obtaining an adjudication of liability in accordance with the Federal Rules of Civil Procedure?

The Respondents filed a civil action in District Court against Ryan's Coal Company, Inc. ("Ryan's"), an Alabama corporation claiming, among other things, money due under the terms of a collective bargaining agreement with Ryan's. Thereafter, on January 14, 1985, a consent judgment was entered in that action finding Ryan's to be liable to the Respondents in the sum of $492,754.91, which the Court of Appeals correctly found to be a money judgment. (Appendix, A22-23). The Petitioners, George M. Simmons and Alan's Coal Sales, a partnership ("Alan's") were not parties to this action, or to the settlement of it, or the consent judgment entered on January 14, 1985.

The judgment against Ryan's in favor of Respondents was not paid. Respondents sought to enforce their judg-

ment by instituting a contempt proceeding, a dubious proceeding for the enforcement of a money judgment. See Rule 69(a), Fed.R.Civ.P.; *Shuffler v. Heritage Bank*, 720 F.2d 1141 (9th Cir. 1983). Petitioners were named in the contempt proceeding along with Ryan's. In the contempt proceeding the Respondents contended Alan's was a successor of Ryan's and that George M. Simmons, Ryan's president and principal shareholder, was its alter ego. Neither of these issues were raised or decided in the civil action which resulted in the January 14, 1985 judgment. After conducting a hearing on the contempt petition the District Court rendered judgment against the Petitioners in the amount of $728,395.14, this being the amount then computed to be due under the January 14, 1985 judgment against Ryan's, with interest, fees, and other charges. (Appendix, A39-40). This judgment was rendered against the Petitioners in spite of the fact they had never been sued in a civil action, had never been served with a summons and complaint, had never been given the opportunity to demand a jury trial on the alter ego and successor issues, and had never been given the opportunity for pre-trial discovery on these issues in accordance with the Federal Rules of Civil Procedure. By its April 2, 1986 decision the Court of Appeals for the Eleventh Circuit sanctions this unusual, unorthodox, and unprecedented procedure.

By affirming the action of the District Court in imposing a civil money judgment on non-parties to the judgment through the vehicle of a civil contempt proceeding the Court of Appeals has sanctioned such a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. There is no authority in the Federal Rules of Civil Procedure for imposing

a money judgment on non-parties to a judgment through the vehicle of a contempt proceeding and no precedent in the decisions of this Court, or any other court, for such a procedure.

The Federal Rules of Civil Procedure were obviously designed to, among other things, protect the rights of defendants in civil actions and to afford them due process of law. The procedures required before a party can obtain a judgment are obviously directed to this end. If a plaintiff can obtain a money judgment against multiple parties by obtaining a judgment against one party and then expanding his judgment to include other parties through the vehicle of a contempt proceeding the safeguards and protections of the Federal Rules of Civil Procedure have been circumvented. This circumvention, permitted by the decision of the Court of Appeals, should be remedied by this Court's exercise of its supervisory powers.

The correction of the error of the District Court and the Court of Appeals has significance far beyond this case. The procedure approved by the Court of Appeals in this case strikes at the very heart of the Federal Rules of Civil Procedure and the safeguards they provide. If the decision of the Court of Appeals is allowed to stand a plaintiff desiring a judgment against several related parties will never again have to sue and prevail on the merits in a civil action against all of the parties. The plaintiff will be free to proceed in a civil action against a single party against whom his claim for liability may be strongest and after obtaining a judgment then pursue the remaining parties in a civil contempt proceeding where the procedural safeguards, and the right to jury trial, are not available. This procedure is a serious threat to

due process and equal protection of the laws, but this is exactly what happened in this case.

Other than the Court of Appeals' decision in the instant case Petitioners' research finds no other decision of a Court of Appeals which has allowed the expansion of a money judgment to include non-parties through the vehicle of a judgment enforcement proceeding, such as contempt. Such a tactic has been attempted in cases which resulted in decisions by two other Circuit Courts of Appeal. In *North Pacific Steamship Co. v. Pyramid Bulkcarriers, Inc.*, 515 F.2d 426 (5th Cir. 1975) and *Parker v. United States*, 126 F.2d 370 (1st Cir. 1942) it appears that similar attempts were made to expand an underlying money judgment to additional parties in post-judgment enforcement proceedings. In *North Pacific Steamship Co. v. Pyramid Bulkcarriers, Inc.* an attempt was made to have a money judgment imposed upon non-parties to the underlying judgment on the grounds that the additional parties to the enforcement proceeding were alter egos of the underlying judgment debtor, one of the theories employed in the instant case. The Fifth Circuit rejected this attempt as being an "improper procedure", stating that it found "no decision, rule, or statute" authorizing such a procedure. In *Parker v. United States* the First Circuit emphatically held that although a corporate officer may be held in contempt of court for causing a corporation to fail to do that which it had been ordered to do and which it had the ability to do, the monetary obligation of the corporation imposed by a judgment is not the personal obligation of the officer.

Consequently, the decision in the instant case appears to be in conflict with the cited decisions of the Fifth Circuit and the First Circuit, and this Court should resolve this conflict by granting this petition for certiorari.

II.

May the Seventh Amendment right to a jury trial be circumvented by seeking a money judgment in a civil contempt proceeding?

By the procedure followed in this case the Petitioners have had a money judgment imposed upon them without ever having had the opportunity to have, or even request, a jury trial. Petitioners were not parties to the civil action which resulted in the January 14, 1985 judgment. They were not made parties until Respondents instituted their post-judgment civil contempt proceedings. In a civil contempt proceeding a party is not entitled to a jury trial. See *Shillitani v. United States*, 384 U.S. 364 (1966). The judgment which was rendered against Petitioners was rendered in such a post-judgment civil contempt proceeding.

Decisions of this Court have made it clear that the Seventh Amendment guarantees a jury trial in all cases where traditional legal remedies, such as money damages, are sought. See *Curtis v. Loether*, 415 U.S. 189 (1974); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962). The action in this case was essentially an action to collect a debt allegedly due under a contract, and this is an action of a traditionally legal character. *Dairy Queen, Inc. v. Wood, supra.* If Petitioner Simmons was to be held liable on the contractual obligation of judgment debtor Ryan's Coal Company as its alter ego he had a right to a jury trial on that issue. He was not accorded that right in this proceeding.

The Court of Appeals' decision in this case sanctions a procedure which denied a jury trial in this case. This Court should exercise its power of supervision to correct this departure from this constitutionally mandated right.

While the opinion of the Court of Appeals in this case does not articulate why it sanctions the deprivation of a jury trial we may speculate that it concluded that a jury trial is not required because this action was brought under the Employee Retirement Income Security Act, particularly under the provisions of 29 U. S. Code, Section 1132. If the Eleventh Circuit's decision is based upon a conclusion that a jury trial is not authorized for such an action it is in conflict with the decision of the U. S. Court of Appeals for the Seventh Circuit in *Bugher v. Feightner*, 722 F.2d 1356 (7th Cir. 1983), which specifically holds that a jury trial is a right in such a case because the action is essentially one to recover money due by contract. The Court should resolve this conflict between the circuits by granting the petition for certiorari in this case.

III.

Is a consent decree enforceable by a contempt proceeding if the decree does not conform to the specificity requirements of Rule 65(d) of the Federal Rules of Civil Procedure?

Rule 65(d) of the Federal Rules of Civil Procedure requires that every order granting an injunction: (1) "be specific in terms" and (2) "describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." The Eleventh Circuit in its decision in this case impliedly recognizes that the consent decree was in substance an injunction and violated Rule 65(d) by ordering Ryan's Coal Company to make all contributions to the Respondents required by the collective bargaining agreement attached to the Respondents' complaint and by ordering Ryan's to make the installment payments to the Respon-

dents set out in the Judgment Note attached to the consent decree. The Eleventh Circuit, however, held that the District Court's contempt orders based upon Ryan's failure to comply with the consent decree were valid in spite of this non-compliance for two reasons. First, the court held that lack of compliance with Rule 65(d) was not fatal to the contempt orders because "the contemnors understood their obligations under the injunction." (Appendix, A19). Second, the Eleventh Circuit excused the non-compliance with Rule 65(d) because the contemnors did not seek clarification or modification of the consent decree in the District Court. (Appendix A20-21). These holdings are in conflict with the decision of the Seventh Circuit in *H. K. Porter Co., Inc. v. National Friction Products Corp.*, 568 F.2d 24 (7th Cir. 1977) and decisions of this Court.

H. K. Porter Co., Inc. v. National Friction Products Corp., supra, squarely holds that an injunction which refers to or incorporates by reference extraneous documents is unenforceable by contempt proceedings. The Seventh Circuit, relying upon this Court's decision in *International Longshoremen's Association, Local 1291 v. Philadelphia Marine Trade Association,* 389 U.S. 64 (1967), called such a violation of Rule 65(d) "serious and decisive" and held it was fatal to the invocation of contempt proceedings. The Seventh Circuit discussed no possible exception in the case in which an alleged contemnor understood his obligations under the injunction. The decisions of the Eleventh and Seventh Circuits are in obvious conflict.

This holding of the Eleventh Circuit is also in conflict with this Court's decisions in *Schmidt v. Lessard,* 414 U.S. 473 (1974) and *International Longshoremen's*

Association, Local 1291 v. Philadelphia Marine Trade Association, 389 U.S. 64 (1967), which require a strict adherence to the specificity requirements of Rule 65(d). *Longshoremen's* and *Schmidt* emphasize that the specificity provisions of Rule 65(d) "are no mere technical requirements", call these requirements "important requirements" and conclude that a failure to adhere to these requirements is "both serious and decisive". The reasoning of these opinions allows no room for the exception which the Eleventh Circuit has engrafted onto the requirements of Rule 65(d).

A requirement of strict adherence to the specificity requirements of Rule 65(d) is justified in view of what this Court called in *Longshoremen's* the "potent weapon" of the judicial contempt power. The Eleventh Circuit in the instant case erred in permitting the use of the contempt powers to enforce a consent decree which that court impliedly acknowledged violated the strict specificity requirements of the rule.

The Eleventh Circuit's holding that George Simmons and Alan's Coal Sales are entitled to no relief because they did not seek a clarification or modification of the consent decree in the District Court is likewise in conflict with the Seventh Circuit's decision in *H. K. Porter Co., Inc. v. National Friction Products Corp.,* 568 F.2d 24 (7th Cir. 1977) and this Court's decisions in *International Longshoremen's Association, Local 1291 v. Philadelphia Marine Trade Association,* 389 U.S. 64 (1967) and *Schmidt v. Lessard,* 414 U.S. 473 (1974). Neither *Porter, Longshoremen's,* nor *Schmidt* makes any mention of such a requirement. Additionally, neither George Simmons nor Alan's Coal Sales was a party in the original action which gave rise to the consent decree and would have

had no standing to seek a modification or clarification of it.

For each of these reasons the Eleventh Circuit's decision is in conflict with applicable decisions of this Court and the Seventh Circuit.

IV.

Does a District Court lack jurisdiction to modify a money judgment more than ten days after it is entered?

On January 14, 1985, the District Court entered a consent decree against Ryan's Coal Company which ordered Ryan's to make installment payments totalling $492,754.91 to the Respondents. After two post-judgment contempt hearings in November 1985 based on Ryan's failure to make the ordered payments, the District Court entered three separate orders, one of which rendered a judgment against Ryan's, George Simmons, and Alan's Coal Sales in the amount of $728,395.14. (Appendix, A39-40). The Eleventh Circuit explicitly found that the January consent decree was a money judgment but upheld the November judgment as a "modification" of the money judgment contained in the January decree. (Appendix, A24).

The November money judgment cannot be upheld as a modification of the January judgment. Under Rule 59 of the Federal Rules of Civil Procedure the District Court lacked jurisdiction to modify the January judgment more than ten days after its entry. The Eleventh Circuit's holding to the contrary is in conflict with this Court's decision in *Browder v. Director, Department of Corrections of Illinois,* 434 U.S. 257 (1978) and decisions of other federal courts of appeals.

In *Browder v. Director, Department of Corrections of Illinois,* 434 U.S. 257 (1978) this Court held that the strict time limits of Rule 59 of the Federal Rules of Civil Procedure for amending judgments are mandatory and jurisdictional. A court lacks jurisdiction to amend a money judgment after these time limits have expired. Likewise, the Fifth Circuit in *Flores v. Procunier,* 745 F.2d 338 (5th Cir. 1984) and the First Circuit in *White v. New Hampshire Department of Employment Security,* 629 F.2d 697 (1st Cir. 1980), *reversed on other grounds,* 455 U.S. 445 (1982) have held the time restrictions of Rule 59 are mandatory and jurisdictional. The Third Circuit in *Government of the Virgin Islands v. Massac,* 277 F.2d 660 (3rd Cir. 1960) held a District Court's amended order void because it was entered more than ten days after the entry of judgment in violation of Rule 59.

The Eleventh Circuit's affirmance of the November order as an amended money judgment is in obvious conflict with these decisions. This Court should grant this petition and hold that the District Court lacked jurisdiction to amend the money judgment on November 25 and, therefore, the order purporting to do so is void.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have served three copies of the foregoing Petition for Writ of Certiorari on all parties required to have been served, by mailing same to the Honorable Robert H. Stropp, Jr., 2101 City Federal Building, Birmingham, Alabama 35203, Attorney for Harrison Combs, John J. O'Connell and Paul R. Dean, as Trustees of the United Mine Workers of America Health and Retirement Funds, properly addressed and with sufficient first-class postage prepaid, this the 5th day of August 1986.

WILLIAM H. MILLS
Of Counsel for Petitioners

APPENDIX

Harrison COMBS, John J. O'Connell and Paul R. Dean, as Trustees of the United Mine Workers of America Health and Retirement Funds, Plaintiffs-Appellees,

v.

RYAN'S COAL COMPANY, INC., a corporation; George M. Simmons; and Alan's Coal Sales, Defendants-Appellants.

Nos. 85-7743, 85-7751.

United States Court of Appeals,
Eleventh Circuit.

April 2, 1986.

Appeals were taken from orders of the United States District Court for the Northern District of Alabama, U.W. Clemon, J., which found individual and corporations in contempt. The Court of Appeals, Johnson, Circuit Judge, held that: (1) initial finding of contempt was not an appealable order; (2) underlying injunction adequately complied with Rule 65; (3) determination that individual was alter ego of corporation and that another corporation was successor to first corporation was proper; (4) contempt could not be used to enforce money judgments; and (5) contemnors did not show inability to pay.

Affirmed in part, remanded in part, and dismissed in part.

1. Federal Courts (Key) 754

Whether a court order is final and appealable is a question of law subject to independent review before the Court of Appeals.

2. Contempt (Key) 66(2)

Finding of civil contempt is not generally reviewable on interlocutory appeal; party must wait until a final decree is issued.

3. Contempt (Key) 66(2)

Orders imposing a fine or penalty for contempt which may be avoided by the party purging himself of the contempt by complying with the order are not appealable as interlocutory orders; order in which a fine or penalty is imposed within a time certain that may not be avoided by some other form of compliance may be taken on appeal immediately.

4. Contempt (Key) 66(2)

Order which made findings of fact and found parties in civil contempt but which left open several questions and was conditioned on the submission of a substantial quantum of information at a subsequent hearing before the final finding of civil contempt would be issued was not final and appealable.

5. Contempt (Key) 66(2)

For a contempt order entered in a post-judgment proceeding to be appealable, there must be both a finding of contempt and a noncontingent order of sanction.

6. Contempt (Key) 66(4)

Order of contempt was not appealable, even though contemnors were not parties to the action, where they had been found to be alter egos of party to the action.

7. Federal Courts (Key) 573

Appeal will lie from an interlocutory order modifying an injunction only if a subsequent order alters the legal relationship between the various parties. 28 U.S.C.A. § 1292(a)(1).

8. Contempt (Key) 66(2)

Order which made findings of contempt was not appealable on theory that it was an order modifying an injunction because it imposed obligation on parties not covered by original consent decree, where the additional parties had been determined to be alter ego of one of the parties to the original consent decree. 28 U.S.C.A. § 1292(a)(1).

9. Injunction (Key) 219

Failure to abide by the precise terms of Rule 65(d) when issuing an injunction does not compel a finding of the injunction as void; depending upon the materiality of the departure, injunction may be vacated or reversed or the offending clause may be stricken from the decree; court may disregard the defect if it is clear from the totality of the language and the various documents that the contemnors understood their obligations under the injunction. Fed.Rules Civ.Proc.Rule 65(d), 28 U.S.C.A.

10. Injunction (Key) 204

Injunction adequately stated the reasons for its issuance, defined the persons to whom it applied, and defined the acts enjoined, even though it did not set out in full the collective bargaining agreement with which compliance was being required, and could support a finding of contempt, especially where it was clear that contemnors were aware of their obligations as they had complied with requirements for period of three months. Fed.Rules Civ. Proc.Rule 65(d), 28 U.S.C.A.

11. Contempt (Key) 20

Court may use the remedy of citation of contempt to enforce an earlier judgment entered pursuant to consent decree.

12. Contempt (Key) 25

When a party fails to satisfy a court-imposed money judgment, appropriate remedy is writ of execution, not a finding of contempt.

13. Contempt (Key) 20

Consent decree was a money judgment which was not enforceable by contempt despite allegation that the consent decree "forestalled the entry of a final judgment of money subject to execution."

14. Contempt (Key) 72

If court's goal in ordering imprisonment is to coerce rather than to punish, incarceration is viewed as civil, even though imprisonment has concomitant punitive effects.

15. Contempt (Key) 40, 72

If court seeks to punish or to vindicate its own authority, the contempt imposed is criminal and the plethora of procedural protections are invoked.

16. Contempt (Key) 64

Fact that plaintiffs did not specifically request incarceration when they sought to hold defendants in contempt was immaterial to court's authority to issue contempt order where plaintiffs made a general request for whatever remedy the court deemed appropriate.

17. Contempt (Key) 64

If trial court was in any way attempting to secure payment of money found to be owing under consent decree or prior contempt finding, order of incarceration was improper because the money judgment is not properly enforced except by writ of execution.

18. Corporations (Key) 1.7(2), 445.1

Evidence that individual directed and controlled finances of both companies, as well as numerous others, and ran all of them out of one office, that the decision not to pay an obligation under consent decree was his, and that he authorized over $60,000 in payments to himself and others while he was in default of his obligations under the consent decrees sustained finding that individual was alter ego of one corporation and that second corporation was successor of first, so that all were liable under the consent decree.

19. Contempt (Key) 24

Finding of present ability to satisfy order is a prerequisite to a finding of contempt in the entry of sanctions for noncompliance; it is improper to impose contempt sanctions of any sort if the alleged contemnor is not able to satisfy the court's directives.

20. Contempt (Key) 60(1)

Party seeking contempt citation retains the ultimate burden of proof on issue of alleged contemnor's ability to comply but, once party seeking the citation makes out prima facie case, burden of production shifts to the alleged contemnor who must then come forward with evidence to show a present inability to comply.

21. Contempt (Key) 60(3)

Alleged contemnor did not show inability to comply with terms of consent decree where financial records submitted were seriously inadequate and unverified and were based on representations of individuals rather than on independent audits.

Appeals from the United States District Court for the Northern District of Alabama.

Before JOHNSON and HATCHETT, Circuit Judges, and ALAIMO*, Chief District Judge.

JOHNSON, Circuit Judge:

This case requires that we determine the precise scope of a trial court's power to find parties in contempt and to order sanctions in order to secure compliance with that court's orders. It also requires that we determine what constitutes a final, appealable order in the context of contempt citations. For the reasons explained herein, we find that the appeal of the trial court's first order is improperly brought because that order is not final and hence may not be heard on interlocutory appeal. Accordingly, the action docketed as No. 85-7743 is DISMISSED. As to the trial court's two orders of November 25, docketed as No. 85-7751, we AFFIRM in all respects that portion entering a final civil judgment. As to that portion directing that appellant George Simmons be incarcerated, we VACATE AND REMAND for clarification or modification.

I.

Appellees, Trustees of the United Mine Workers Health and Retirement Funds ["the Trustees" or "the appellees"], filed an action under the Employee Retirement Income Security Act, 29 U.S.C.A. § 1132(g)(2)(E) (1985) ["ERISA"], in 1983 against appellant Ryan's Coal Inc. ["Ryan's"] seeking both legal and equitable relief under a collective bargaining agreement due to Ryan's failure

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*Honorable Anthony A. Alaimo, Chief U.S. District Judge for the Southern District of Georgia, sitting by designation.

to make scheduled pension fund payments for its employees as required by 29 U.S.C.A. § 1145.

Ultimately appellees and appellant George Simmons ["Simmons"], president and chief executive officer of Ryan's agreed on a consent decree and order, which was entered on January 14, 1985, awarding the Trustees the desired remedies, including $492,754.91 to be paid in installments with interest, and injunctive relief preventing assets transfers except for valid and fair consideration. The trial court retained jurisdiction so as to monitor compliance. Ryan's made its January payment and submitted its financial statement as the agreement stipulated. It has made no payments since January and filed no reports since March.

On October 4, 1985, due to Ryan's failure to meet the terms of the consent decree, appellees filed a petition for contempt and a motion for a show cause order. Also named in the petition were appellants Alan's Coal Sales ["Alan's"], Simmons, and Simmons Machinery (another of George Simmons' endeavors). Simmons Machinery is not currently before us. The trial court issued the show cause order on October 10 and set the hearing date for November 8, 1985. Alan's, Simmons Machinery, and Simmons moved to quash or strike all orders. Answers were timely filed. This is the consolidated appeal from two hearings held to enforce the earlier consent decree. To the extent possible, the facts for each are put forth separatly.

November 8 Hearing:

The key actor in this case is George Simmons. He is president, chief executive officer, and 80% stockholder of Ryan's, a contractor that mines coal from land leased to

Alan's, a partnership that retails coal to the public. Ryan's is under contract to sell all of the coal it mines to Alan's. Simmons is a general partner, manager, and majority shareholder in Alan's. He is also president and sole stockholder in Simmons Machinery, and is involved in a number of other ventures.

From their creation until the trouble that led to the consent decree, Alan's and Ryan's were operated as separate businesses, with individual books and accounts, though they were both run out of the same building, where Simmons had his office and headquartered all of his various businesses. Due to audits pursuant to the collective bargaining agreement, this arrangement was generally known to appellees.

In March Ryan's ceased production and began winding down its business. It did not make the payment scheduled in the consent decree. It no longer had a bookkeeper, so the responsibility for bookkeeping and the writing of checks was assumed by Alan's. Separate books were maintained, but all of the money was run through Alan's accounts and checks for Ryan's debts were drawn from these accounts. When Ryan's closed in June, the cash balance of over $10,000 was transferred from Ryan's to Alan's account. All of Ryan's receivables were deposited into Alan's accounts. Total cash disbursements by Alan's for Ryan's obligations was $137,000, including employees' paychecks.

At closing, Ryan's had 1985 gross sales of $650,000, negative equity of almost $100,000, and assets of $1,620,000, 90% of which were receivables owed by Alan's. Earlier Alan's had been permitted to execute in favor of Ryan's a seven year promissory note for $1.5 million, interest free, owing to Ryan's for unpaid-for coal sales. At some point within three months prior to closing, Ryan's paid Simmons

over $10,000 and paid $50,000 to Simmons Equipment Co., a corporation entirely owned and operated by Simmons.

The hearing on November 8 was to consider the failure to comply with the consent decree entered in January. Simmons Machinery was dismissed as a party. The court further considered whether Alan's or Simmons should be considered the successor and/or *alter ego* of Ryan's for purposes of enforcing the obligations under the January decree.

Simmons testified at the hearing that neither Ryan's nor Alan's had the money to make the required pension fund payments. He further testified that he personally could not pay the required amount. However, he did not provide access to any of the financial records for himself or for Ryan's for 1985. He argued that neither he nor Alan's should be held responsible for Ryan's debt because appellees knew of the close relationship and made no effort to include Simmons or Alan's in the January consent decree.

On November 13, the district court entered an order and findings of fact that Alan's was the successor and that Simmons was the *alter ego* of Ryan's. Alan's and Simmons were held in civil contempt along with Ryan's for failure to abide by the January consent decree. The remedy ordered was compensatory and gave the contemnors the opportunity to purge themselves of contempt prior to a second hearing, ordered for November 22, at which the court would determine compliance with the November 13 order and the amount of costs and fees to be assessed. The three appellants were ordered to pay appellees $226,411.73, to post a surety bond of $500,000 by November 22, and, at the request of the Trustees, to suffer

an audit for unpaid pension contributions due for the period since March. Appellees were awarded attorney's and accountant's fees and costs.

November 22 Hearing:

Prior to this hearing both sides were to secure several items for the court's consideration. Appellees were directed to prepare and did submit affidavits enumerating costs and fees incurred. Appellants had been ordered to secure the $500,000 surety bond. All three appellants claim that they sought a bond and that all three were unable to secure one, due to their financial circumstances. Appellees maintain that only Ryan's sought the bond.

Despite the court's order, Simmons did not have an audit prepared of himself or of either company. Instead he had his accountant prepare an unverified personal financial statement. The accountant refused to certify the accuracy of that statement because it was inconsistent with Generally Accepted Accounting Principles: the figures were based solely on Simmons' representations, rather than on a standard audit; the accountant had no access to Simmons' current bank records; and the asset valuations were based on liquidation price rather than fair market value. Appellees contend, and the court below found, that this had the effect of significantly undervaluing Simmons' net worth. Appellees also claim that Ryan's sold coal to Alan's at prices significantly below fair market value.

The record below shows, *inter alia,* that Simmons has 100% ownership of Simmons Equipment Co. (which he claims is not producing a profit), significant holdings or interests in several other enterprises, including Calvert & Marsh Co. and Berry Mountain Mining Co. (the former he claims is insolvent and not operating; the latter he

claims to be heavily in debt and about to go under), 2000 acres of land, a cattle farming operation, $800,000 worth of heavy equipment, and a $250,000 home. He also created an irrevocable trust for his children's benefit and loaned it $1 million. He claims that all of these assets are encumbered by various mortgages and collateral arrangements, or are owned jointly with his wife. He offered no independent accounting of his worth, no independent appraisals of the value of his tangible holdings, no recent bank records, no tax return for 1984, incomplete balance statements for some of his businesses, and he failed to reveal a $400,000 note owed him by Berry Mountain Mining.

In light of the failure to provide the information ordered at the November 8 hearing, the trial court on November 25 entered two orders. First, it found bad faith failure to comply with its earlier order. The court entered findings that the November 13 order was not a final order, that Simmons had failed to submit an audited and verified financial statement and had significantly understated his worth, that he had failed to provide financial records for Simmons Equipment and that the court could thus infer that it was viable and profitable. The court found bad faith in Simmons' failure to attempt to meet his obligations under the November 13 order. It also found that, as the *alter ego* of Ryan's, Simmons by his failure to make the required payments demonstrated bad faith in light of his control of Berry Mountain Mining, which had gross receipts of between $2-3 million in the month prior to the hearing. Taken as a whole, the court found that this refuted Simmons' claim of inability to pay. Accordingly, the court entered a written judgment against all three appellants in the amount of $728,395.14.

The trial court, having previously adjudged Simmons in civil contempt on November 13, also entered an order that he be incarcerated for 21 days unless he demonstrated a good faith effort to comply with the court's orders.

On November 18, 1985, Ryan's, Simmons, and Alan's filed notice of appeal from the November 13 order and a motion to stay enforcement of the judgment. On November 22, the appellants appealed to this Court the trial court's entry of a final judgment and order of incarceration. On November 27, this Court granted the motion for a stay pending appeal of the trial court's order for the incarceration of Simmons and of its order permitting enforcement of the judgment. We *sua sponte* ordered the two appeals consolidated, and we directed the parties to address in briefs and at oral argument whether the November 13 order was final and hence appealable.

II.

The issues in this case may be broken down into five questions: A) whether the district court's order of November 13 was a final appealable order; B) whether the consent decree was entered consistent with Fed.R.Civ.P. 65; C) whether the district court improperly resorted to compensatory and coercive contempt remedies; D) whether the trial court properly found Alan's and Simmons shared in Ryan's responsibility for the contumacious conduct; E) whether the trial court properly found that Simmons had the present ability to satisfy the court ordered obligations.

A. *The November 13 Order*:

We directed both parties to present argument as to whether the trial court's order of November 13 following

the November 8 hearing was a final, appealable order. That order made findings of fact and found all three appellants in civil contempt for failure to fulfill the obligations of the consent decree, although Alan's and Simmons were not technically parties to the agreement between Ryan's and the appellees in January. The trial court ordered appellants to pay to the trustees immediately over $225,000, to post a $500,000 bond, to suffer an audit and to pay any pension fund amounts found owing, and to pay the appellees' fees and costs. That order also directed that another hearing be held on November 22 at which the court would determine the fee award and consider compliance.

[1] If the November 13 order was final and appealable then the subsequent hearing on November 22 was effected without jurisdiction and the order then issued is a nullity. If the November 13 order was not final then this Court has no power to hear appellants' complaints regarding the issues raised under No. 85-7743, except to the extent that the November 13 order laid the predicate for the ultimate judgment of the trial court that was entered on November 25. Whether a court order is final and appealable is a question of law and hence is subject to independent review before this Court. *Cathbake Inv. Co. v. Fisk Electric Co.*, 700 F.2d 654, 656 (11th Cir. 1983).

[2, 3] Generally a finding of civil contempt is not reviewable on interlocutory appeal. The party must wait until a final decree is issued. *Fox v. Capital Co.*, 299 U.S. 105, 107, 57 S.Ct. 57, 58, 81 L.Ed. 67 (1936); *Drummond Co. v. District 20, United Mine Workers*, 598 F.2d 381, 383 (5th Cir.1979). But as we noted in *Drummond*, there are exceptions to this general rule. *Id.* Most relevant

to this appeal is the distinction we have drawn between orders imposing a fine or penalty for contempt which may be avoided by the party purging himself of the contempt by complying with the order, and those in which a fine or penalty is imposed within a time certain that may not be avoided by some other form of compliance. The former is not appealable in an interlocutory action; the latter may be taken on appeal immediately. *Id.* at 384; *Hoffman v. Beer Drivers & Salesmen's Local 888,* 536 F.2d 1268, 1272-73 (9th Cir.1976). The key is whether the contempt penalties imposed are "conditional or subject to modification." 598 F.2d at 384. The goal is to avoid the "risk of disrupting a continuing, orderly course of proceedings below." *Id.*

[4] The November 13 order left open several questions to be resolved on the 22d—namely, whether appellants had paid roughly one third of the amount due and posted the balance in the bond, whether additional contributions were due for the period since March (the point at which Ryan's had stopped making payments to the pension fund a second time), the determination of costs and fees to be paid by appellants, and whether appellees had provided the required accountings and audits in order to determine the ability to pay of Alan's and Simmons.

The November 13 order was merely interim and clearly conditioned on the submission of a substantial quantum of information at the second hearing before a final finding of civil contempt would be issued, if at all. This would depend on whether appellants purged themselves by good-faith compliance during the two-week interim. Appellate review of the November 13 order would be disruptive of what was obviously a continuing effort on the part of the district court to prod the appellants into compliance

while avoiding making a final finding of contempt if possible.

Appellants attempt to escape this general rule in three ways. First, they argue that it applies only to contempt orders occurring during the pendency of litigation, while the order here was post-decretal. The case they cite, *Sanders v. Monsanto Co.*, 574 F.2d 198, 199 (5th Cir. 1978), states that a contempt motion is appealable if "not part and parcel of a continuing litigation . . ." because "no further district court action occurs." *Sanders* is inapposite. Factually, it was directed at a case of *denial* of a motion for contempt. Obviously if the court denies contempt following final judgment there will be no further proceedings. Logically, an appeal should lie in such cases because "there is no other judgment from which an appeal will lie." *9 J. Moore & B. Ward, Moore's Federal Practice* ¶ 110.13[4] at 168 (2d ed. 1985).

[5] In a case such as this, where the contempt motion is *granted,* the court will be (and here is) engaged in on-going intervention. The action complained of on appeal is subject to modification or repeal. The bar against interlocutory appeals of civil contempt citations facilitates compliance with court directives by allowing the trial judge to "place the keys of the prison cell in the contemnor's pocket." If we were to extend *Sanders,* and hold that any post-decretal contempt citation was immediately appealable, the effect would be to tie the hands of the district court, diminish compliance with its orders, and augment our own workload. Thus, the general rule is that "a contempt order entered in a postjudgment proceeding that does not terminate that proceeding is . . . non-appealable." *J. Moore, supra,* at ¶ 110.14[1] at 198. There must be *both* a finding of contempt and a *noncontingent* order of sanction. *Shuffler v. Heritage Bank,* 720 F.2d 1141, 1145

(9th Cir.1983). Only at that point may the contemnor have his appeal.

[6] Second, appellants point to the fact that there is an exception to the general rule that makes appealable contempt orders against non-parties. *Sanders,* 574 F.2d at 188; *J. Moore, supra,* at ¶ 110.4[1] at 198. This is their best argument, but it does not carry the day. While Alan's and Simmons were not parties to the original consent decree entered in January, the trial court found in its order of November 13 that they were the successor and *alter ego,* respectively, of Ryan's. Thus, while they were not named defendants in the consent decree, their interests were in fact represented and their obligations determined as a matter of law. They were there but merely hidden behind the corporate veil which the trial court pierced in the November 13 order.

[7] Third, they argue that even if the November 13 order is not a contempt sanction subject to interlocutory appeal, this action may still be appealed under 28 U.S. C.A. § 1292 (a)(1), which section permits appeals from interlocutory orders that modify an injunction. An appeal will lie under Section 1292 (a)(1) only if a subsequent order alters the legal relationship between the various parties. *Motorola, Inc. v. Computer Displays International,* 739 F.2d 1149, 1155 (7th Cir.1984). This Section is construed narrowly. *Carson v. American Brands, Inc.,* 450 U.S. 79, 84. 101 S.Ct. 993, 996, 67 L.Ed.2d 59 (1981).

[8] Appellants argue that the original injunction issued as part of the consent decree imposed obligations to contribute to the pension fund only on Ryan's. The November 13 order added two new obligors and accelerated the amount due by requiring posting of the bond. This argument fails for two reasons. First, there was no mod-

ification as to the party obligors because the trial court's finding that Alan's is the successor and Simmons the *alter ego* of Ryan's means that they were, in effect, before the court for the original decree.

Second, the original decree set forth the total dollar amount owing and set up an installment payment plan. But the decree also specifically provided that the amount due would be accelerated upon default. R 1-6-6 to -7. The fact that the court was forced to do this following the November 22 hearing works no modification but rather is consistent with the original injunction.[1] The November 25 order "does not change the parties' original relationship, but merely restates that relationship in new terms." *Motorola*, 739 F.2d at 1155.

For the reasons foregoing, we hold that the order of the district court entered on November 13 was not final and appealable. It follows that we have no jurisdiction to entertain the appeal in No. 95-7743. It is dismissed.[2]

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1. While, as we noted *supra*, the November 13 order was not final because there remained several court imposed obligations on each party to be performed by November 22, it does not follow that the trial court modified the original injunction in its later order. We must be careful to distinguish between the proper concern of Section 1292(a)(1)—changes in existing legal obligations imposed by means of injunctions—and the contingencies extant at the November 8 hearing. The latter were merely matters left open with directives to supply information or to comply in certain ways with the legal obligations imposed by the original decree and not subsequently modified. It was the *method of implementing* the legal obligations that changed, not the underlying obligations themselves.

2. Of course, this does not prevent us from considering the merits of these same issues in a properly constituted appeal. As both parties agreed at oral argument, all of the substantive issues contested in No. 85-7743 were restated in No. 85-7751. Further, the trial court's judgment of November 25 incorporated by reference all of the factual and legal conclusions reached in the November 13 order. Thus, we must still resolve all of the issues presented in both appeals. Accordingly, the substantive effect of dismissing No. 85-7743 is nil.

B. *The Consent Decree and Rule 65:*

Appellants attack the trial court's judgment entering the consent decree on the grounds that it violates Fed.R.Civ.P. 65(d), which rule provides that an order granting an injunction must "set forth the reasons for its issuance; shall be specific in terms; [and] shall describe in reasonable detail, *and not by reference to the complaint or other document,* the act or acts sought to be restrained . . . ." (Emphasis supplied.)

Appellants' complaint is that the decree and order below enjoined appellants, *inter alia,* to "otherwise comply with the reporting provisions of the Collective Bargaining Agreement attached to the Verified Complaint herein . . . ." Further, the court ordered appellants to "be obligated and bound to abide by the terms and conditions of the Judgment Note attached hereto . . . and expressly incorporated by reference herein and made a part hereof." In so doing, appellants claim, the court violated the Rule's prohibition against incorporation by reference.

While the grant or denial of an injunction is generally entrusted to the discretion of the trial court, at issue here is whether that court properly applied the legal requirements of Rule 65. Accordingly, this matter is subject to plenary review. *Cathbake,* 700 F.2d at 656.

[9] Appellants are entitled to no relief here for two reasons. First, while the preference is to enforce the requirements of Rule 65(d) "scrupulously," 7 *J. Moore, Moore's Federal Practice* ¶ 65.11 at 65-101 (2d ed 1985), failure to abide by the precise terms of the Rule does not compel finding the judgment below void. *Lawrence v. St. Louis-San Francisco R. Co.,* 274 U.S. 588, 591-92, 47

S.Ct. 720, 722, 71 L.Ed. 1219 (1927). Depending on the materiality of the departure from the Rule we may vacate or reverse the judgment, *J. Moore, supra,* at 65-102, or strike the offending clause from the decree. *Hartford-Empire Co. v. United States,* 323 U.S. 386, 410, 65 S.Ct. 373, 385, 89 L.Ed. 322 (1945). A court may also disregard the defect if it is clear from the totality of the language in the various documents that the contemnors understood their obligations under the injunction. *United States v. Goehring,* 742 F.2d 1323, 1324 (11th Cir.1984) (*per curiam*) (Rule 65(d) not specifically invoked, but contempt order upheld that incorporated earlier order because later order "contains sufficient findings of fact and conclusions of law for this court to perform its proper function and for the appellant to clearly understand the basis for the contempt order."); *Seagram-Distillers Corp. v. New Cut Rate Liquors, Inc.,* 221 F.2d 815, 821 (7th Cir.) (Rule 65(d)), *cert. denied,* 350 U.S. 828, 76 S.Ct. 59, 100 L.Ed. 740 (1955); *Ross-Whitney Corp. v. Smith Kline & French Laboratories,* 207 F.2d 190, 198 (9th Cir.1953) (Rule 65(d)).

The appropriate inquiry is into the degree of specificity of the language of the decree in order to determine that appellate review is possible and that the contemnors knew their obligations. *Schmidt v. Lessard,* 414 U.S. 473, 476-77, 94 S.Ct. 713, 715-16, 38 L.Ed.2d 661 (1974) (*per curiam*). The Supreme Court in *International Longshoremen's Assoc., Local 1291 v. Philadelphia Marine Trade Assoc.,* 389 U.S. 64, 88 S.Ct. 201, 19 L.Ed.2d 236 (1967), considered the specificity and incorporation by reference provisions of Rule 65(d). Contrary to appellant's suggestion, the Court did not announce a *per se* requirement of dismissal where a trial court fails to adhere strictly to the provisions of the Rule. As the Court in *Longshoremen's*

noted, it was not dealing "with a violation of a court order by one who fully understands its meaning but chooses to ignore its mandate[, but rather with] a decree that can only be described as unintelligible." 389 U.S. at 76, 88 S.Ct. at 208. The Court's concern was with notice, with ensuring that the trial court's decree not furnish a basis for contempt unless it constituted "an operative command capable of 'enforcement.'" *Id.* at 74, 88 S.Ct. at 206; *accord, Schmidt,* 414 U.S. at 476, 94 S.Ct. at 715. In this case there is no question but that the decree was intelligible and capable of enforcement. Nor is there any question as to whether the appellants understood their obligations, for they complied with the decree for almost three months.

Appellants place great stock in *United States Steel Corp. v. United Mine Workers,* 519 F.2d 1236 (5th Cir. 1975), *cert. denied,* 428 U.S. 910, 96 S.Ct. 3221, 49 L.Ed.2d 1217 (1976). The Court there, relying on *Longshoremen's* held that an order that incorporated into its provisions contract language from a collective bargaining agreement was a violation of Rule 65(d) because the ambiguity of the contract's language did not give adequate notice. *Id.* at 1246-47. But this case simply will not bear the weight that appellants seek to place upon it. The crucial contractual provision there was the arbitration clause, which the Court characterized as "extraordinarily broad." *Id.* at 1247. Upon the facts of that case, and the tethering of the opinion to *Longshoremen's,* there can be no doubt that the former Fifth Circuit was not adopting a *per se* rule. Rather it made an individualized determination based on the factual posture of that case.

Second, as appellees point out, at no time before the trial court did appellants ever complain about the adequacy

of the consent decree which they themselves helped to craft. They made no attempt to request more specific language; they chose not to exercise their right to the usual remedy for inadequacies of this sort: a motion for clarification or modification of the consent decree. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192, 69 S.Ct. 497, 500,, 93 L.Ed. 599 (1949); *Newman v. State of Alabama*, 683 F.2d 1312, 1318 & n. 15 (11th Cir.1982), *cert. denied*, 460 U.S. 1083, 103 S.Ct. 1773, 76 L.Ed.2d 346 (1983). At this point any possible objection they might have to the decree is stale. *Seagram-Distillers Corp. v. New Cut Rate Liquors, Inc.*, 221 F.2d at 821.

[10] As Professor Moore has explained, "There is compliance with the Rule when the injunction states reasons for its issuance, clearly identifies the persons to whom it applies, and defines the acts enjoined." *J. Moore, supra*, at ¶ 65.11 at 65.106. On these facts, and after reading the decree and its attachments, it is clear that all three requirements were met, regardless of the technical language of Rule 65(d). There can be no question but that the appellants were fully aware of their obligations. The best evidence is the fact that they complied with the requirements of the consent decree, in whole or in part, for three months. There is no error.

C. *Money Judgments and Remedies*:

The issue here is really the correctness of the original issuance of the consent decree and the subsequent availability of measures including incarceration to enforce it. Proper resolution of these questions requires that we be both careful and precise in our review of what took place below over the course of three hearings that culminated in the issuance of four separate court orders or judgments.

1) First, appellants attack the trial court's entry of the November 25 judgment on the grounds that it effected enforcement of a money judgment against nonparties to the agreement by means of a contempt sanction. They argue that the appropriate means to enforce a money judgment is via a writ of execution. This is a challenge to a conclusion of law subject to plenary review. *Cathbake*, 700 F.2d at 656.

[11, 12] It is beyond question that a court may use the remedy of a citation of contempt to enforce an earlier judgment entered pursuant to a consent decree. *Newman v. State of Alabama*, 683 F.2d at 1318; *United States v. City of Jackson*, 519 F.2d 1147, 1152 n. 9 (5th Cir.1975). It is equally clear that when a party fails to satisfy a court-imposed money judgment the appropriate remedy is a writ of execution, not a finding of contempt. *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1147-48 (9th Cir.1983); Fed.R. Civ.P. 69(a) ("Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise."). The "otherwise" clause is read narrowly. 7 *J. Moore, Moore's Federal Practice* ¶ 69.02[2] at 69-10 to -10.1 (2d ed. 1985) ("[A] federal court should not . . . enforce a money judgment by contempt or methods ther [sic] than a writ of execution, except in cases where established principles so warrant.").

The order entered in January pursuant to the consent decree is properly characterized as a money judgment. It makes extensive provision for the payment of money to appellees that the court found to be due and owing. The amount owed was not contingent, nor was the obligation to pay conditioned on whether appellants purged themselves of contempt. The only variable was

whether it would be paid immediately or in installments. The consent decree provided for both, depending upon the circumstances.

[13] Appellees argue that the consent decree was not a money judgment because it "forestalled the entry of a final judgment of money subject to execution" which came with the November 25 order. This does not obtain. The decree entered in January made an award of money.[3] As appellees concede, a consent decree is a judgment. *United States v. Kellum*, 523 F.2d 1284, 1287 (5th Cir. 1975). We see no principled distinction between that which appellees concede was a money judgment in *Shuffler* and that which they claim is something else here.[4] In both cases the trial courts accepted consent decrees that determined that the defendant owed the plaintiff a good bit of money and set up a procedure to pay that money over.

The mere fact that the trial court entered a money judgment in January is not dispositive of the appellants' allegation of error, however. Had the trial court actually

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3. Appellees later concede this, perhaps unintentionally. Brief at 32-33 ("At the hearing on November 8, the Court granted the Funds a sum certain based upon the undisputed amount for which Appellants were delinquent under the Consent Decree.")

4. Appellees point to *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 69 S.Ct. 497, 93 L.Ed. 599 (1949), which case held that a contempt sanction could be used to ensure compliance with an earlier judgment to pay wages in accordance with federal labor law requirements of minimum wages and overtime pay. That case is distinguishable, however, and the distinction lies in the fact that in *McComb* the Court was vindicating the power of the trial court to order a business to comply with the terms of a statute. That order had the concomitant effect of requiring money to be paid in the future. In the instant case, at issue is money past due and owing which was awarded in one large amount—i.e., a money judgment that was retrospective.

entered a finding of contempt for the failure of the appellants to pay the approximately $725,000 there would have been reversible error, for the reason we just explained. But that is not what the trial court did. The November 13 order found the appellants in contempt, in part it appears, for failure to pay this money. But the trial court did not actually attempt to effect its finding or to coerce the appellants into abandoning their contumacious conduct. The court delayed any implementation or enforcement of its finding for two weeks so that the appellants could purge themselves of contempt. It appears that the court intended to enter a final finding of contempt on November 25 if appellants had not demonstrated their good faith.

The court's order of November 25, however, abandoned the avenue of contempt down which it had started to move on November 13. Instead the court simply entered a final civil judgment determining the current obligations of the appellants to the appellees. That judgment, standing alone, finds that the appellants had not made a good faith effort to fulfill the obligations of the original consent decree and enters a final judgment ordering payment in full of the amount due under the January decree and that which had accrued in the meantime. In effect, then, the November 25 order modified and superseded the money judgment contained in the January consent decree.

We have not yet reached the point where the trial court is attempting to effect compliance with its November 25 order. If the appellants choose not to comply, then the trial court may respond as it sees fit, bearing in mind the legal principles we today articulate.

2) Simmons contests the trial court's entry of a second order on November 25 that he be incarcerated until he demonstrates good faith efforts to comply with the court's orders and decrees. In no event would the incarceration be for more than 21 days. Simmons also objects that the trial court ordered incarceration *sua sponte,* rather than upon the specific motion of the appellees, and therefore, he claims, transformed the contempt finding into a criminal penalty.

Because imposition of incarceration is a contempt sanction and effects denial of liberty without according the usual constitutional guarantees, it is a serious step generally resorted to only when other, less draconian methods to secure compliance have proved fruitless. Courts are careful to distinguish between civil and criminal contempt, usually ordering incarceration as a criminal penalty, so as to ensure that the full guarantee of due process is preserved. *See generally, In re Monroe,* 532 F.2d 424 (5th Cir.1976).

[14, 15] Our sole inquiry into the legitimacy of incarceration for contempt, *per se,* is into the purpose of imprisonment. If the court's goal is to coerce, rather than to punish, then incarceration is viewed as civil even though imprisonment has concomitant punitive effects. *Shillitani v. United States,* 384 U.S. 364, 370, 86 S.Ct. 1531, 1535, 16 L.Ed.2d 622 (1966); *In re Dinnan,* 625 F.2d 1146, 1149 (5th Cir. Unit B 1980) (*per curiam*). The distinction between coercion and punishment is one finely drawn. It is nonetheless distinct and dispositive. When an order of incarceration is conditioned upon a refusal to comply in good faith with a court order then the purpose is coercive. Such incarceration represents a legitimate use of the civil contempt power of the court because it has "the obvious

purpose of compelling the witnesses to obey the orders [of the court]. When the petitioners carry 'the keys of their prison in their own pockets'; the action 'is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees.'" *Shillitani,* 384 U.S. at 368, 86 S.Ct. at 1534 (quoting *In re Nevitt,* 117 F. 448, 461 (8th Cir.1902)); *Dinnan,* 625 F.2d at 1149. If a court instead seeks to punish, or to vindicate its own authority, then the contempt imposed is criminal and a plethora of procedural protections are invoked. *United States v. United Mine Workers of America,* 330 U.S. 258, 303-04, 67 S.Ct. 677, 701, 91 L.Ed. 884 (1947); *Dinnan,* 625 F.2d at 1149.

[16] The propriety of the trial court's order of incarceration in this case, however, is not immediately evident. If we properly interpret the trial court's order as premised on failure to make good faith efforts to comply with the appellants' obligation to demonstrate present inability to pay (as discussed at E. *infra*), or to furnish the court with certain information, then the incarceration order was civil and was proper. The purpose of the order would be to goad Simmons into complying or showing an inability to comply with the court's orders. To that effect the court noted that Simmons was to be held for 21 days, but that he could "be released from custody at such shorter period of time as he demonstrates to the Court his willingness to make a good faith effort to comply with the prior orders of [the] Court." Order of November 22, R1-35-2. In that case, the sanction was clearly coercive and conditioned on continued contumacious conduct—a classic exercise of the civil contempt power. The fact that the appellees did not specifically request incarcera-

tion[5] is immaterial, for they made a general request for whatever remedy the court deemed appropriate.[6]

[17] On the other hand, if the trial court was in any way attempting to secure payment of the money found to be owing under either the consent decree or the November 13 contempt finding, then the November 25 order of incarceration was improperly entered because, as we explained *supra,* a money judgment is not properly enforced except by a writ of execution. If that were the case, then this procedural defect would have infected and impugned the legitimacy of the incarceration order *in toto,* even though incarceration could properly have been ordered for a more limited purpose. Accordingly, we must remand the case on this narrow question so that the trial court may clarify the precise purpose of its incarceration order of November 25. If its purpose was to coerce good faith efforts to comply, or to coerce a showing of inability to comply, then the order was proper. If the purpose was to coerce the appellants into satisfying the money judgment, then it was improper.

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5. The record reveals in relevant part:

THE COURT: "What can this Court do to coerce compliance . . ."

* * * * * *

MR. STROPP: ". . . Your Honor, we are interested in simply getting paid in accordance with the Court's consent decree and order. We do not believe that Mr. Simmons has established his inability defense. Any additional measures we would leave within the Court's discretion to coerce compliance."

R3-83-84.

6. Appellants' citation to *First Maryland Leasecorp. v. M/V Golden Egret,* 764 F.2d 749 (11th Cir.1985), is inapposite. We there held that it was error for the trial court to impose a contempt fine *sua sponte,* but in that case neither party had moved for contempt, there was neither notice, nor a hearing, and the court had received no evidence of any sort on damages. In the instant case the sanction was imposed upon motion and hearing with ample opportunity to contest the issues.

D. *Successor and* Alter Ego:

The next question is whether, by whichever means, the obligation imposed may be enforced against Simmons and Alan's. The determination that one may be held liable as *alter ego* or successor to another is a factual determination that is reversible only for clear error. Fed. R.Civ.P. 52(a). "This deferential standard of review imposes an especially heavy burden on the appellant in a case such as this, in which the evidence was largely testimonial, and the district court had the advantage of observing the witnesses and evaluating their credibility firsthand." *Lincoln v. Board of Regents,* 697 F.2d 928, 939 (11th Cir.), *cert. denied,* 464 U.S. 826, 104 S.Ct. 97, 78 L.Ed.2d 102 (1983).

The Supreme Court in *Regal Knitwear Co. v. NLRB,* 324 U.S. 9, 65 S.Ct. 478, 89 L.Ed. 661 (1945), found that those denominated "successors and assigns" could be held liable for damages flowing from failure to abide by an injunction. "Successors and assigns may . . . be instrumentalities through which defendant seeks to invade an order or may come within the description of persons in active concert or participation with them in the violation of an injunction. If they are, by that fact they are brought within [the] scope of contempt proceedings by the rules of civil procedure [Rule 65(d)]." *Id.* at 14, 65 S.Ct. at 481. Likewise, the Court has held that injunctions to prevent violations of the Fair Labor Standards Act, 29 U.S.C.A. § 201 *et seq.* (1985), may be enforced by contempt proceedings "against the corporation, its agents and officers and those individuals associated with it in the conduct of it business, [and] it may also, in appropriate circumstances, be enforced against those to whom the business may have been transferred, whether as a means of evading the judgment or for other reasons."

Walling v. Reuter Co., 321 U.S. 671, 674, 64 S.Ct. 826, 828, 88 L.Ed. 1001 (1944).

On the other hand, in *North Pacific Steamship Co. v. Pyramid Bulkcarriers, Inc.*, 515 F.2d 426 (5th Cir.1975) (*per curiam*), the Court would not pierce the corporate veil to bring in the "phantom" parties in an admiralty action on a motion for an order to show cause. The Court was not so must hostile to the idea, however, as perplexed. "[W]e find no decision, rule, or statute which would authorize a plaintiff to shift the burden of proof to third parties not even named in the original suit." *Id.* at 427. The panel went on to state that it was not foreclosing the use of the *alter ego* doctrine or the piercing of a judgmen debtor's corporate veil "[u]nder proper circumstances and procedures." *Id.*

The *North Pacific* case is distinguishable on the purely factual grounds that it involved an admiralty, as opposed to a labor case. But more importantly, because *North Pacific Steamship* does not squarely control, and because liability here flows from ERISA, we find it appropriate to follow the Supreme Court's holdings, in cases arising under analogous labor law statutes, that have permitted imposing liability for contempt on a succesor or *alter ego*.[7]

[18] Accordingly, we affirm the district court's determination that Simmons and Alan's are liable to the Trustees for the unpaid pension funds. The factual support for the trial court's finding, in both respects, is

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7. Despite protestations by successor corporations, *Computer Sciences Corp. v. NLRB*, 677 F.2d 804, 806 (11th Cir.1982), and by corporate officers, *Donovan v. Grim Hotel Co.*, 747 F.2d 966, 973 (5th Cir.1984, *cert. denied*, ... U.S. ....., 105 S.Ct. 2654, 86 L.Ed.2d 272 (1985), that it is a denial of due process to impose contempt sanctions in the same proceeding in which that corporation or officer is first determined to be a successor or *alter ego* and hence bound by the court's prior judgment, a contempt action may go forward if "the dispute over successorship liability is but a sham." 677 F.2d at 806. That is the case here.

overwhelming. Simmons directed and controlled the finances of both companies, as well as numerous others, and ran the whole lot out of one office. The decision not to pay the obligation under the consent decree was his. During the period when Ryan's was in default of its obligations under the consent decree, Simmons authorized over $60,000 in payments to himself and to other of his wholly owned concerns. Ryan's sales to Alan's were at prices significantly under market value and Ryan's accepted payment in the form of a $1.5 million interest-free note from Alan's to be paid in seven years. Upon the totality of the circumstances, it was not clearly erroneous to conclude that there was skimming and funneling of money from the one to the other. Further, there was significant intermingling of funds beginning in March, as well as overlap of administrative personnel. Ultimately Alan's took over the mining operations of Ryan's and issued paychecks to Ryan's employees from Alan's accounts. Upon all of this evidence we cannot properly say that the trial court's findings were clearly in error.

E. *Present Ability to Pay*:

[19] Appellants challenge the trial court's finding that they collectively had the present ability to satisfy the burden of the consent decree. This is a prerequisite to a finding of contempt and the entry of sanctions for noncompliance; it is improper to impose contempt sanctions of any sort if the alleged contemnor is not able to satisfy the court's directives. *United States v. Rylander,* 460 U.S. 752, 757, 103 S.Ct. 1548, 1552, 75 L.Ed.2d 521 (1983). The trial court's finding of present ability to pay is a factual determination entrusted to the sound discretion of the court and subject to the clearly erroneous rule. *United States v. Hayes,* 722 F.2d 723, 725 (11th Cir.1984) (*per curiam*); *cf., Matter of Newton,* 718 F.2d

1015, 1022 (11th Cir.1983), *cert. denied sub nom. Trio Manufacturing Co. v. United States,* 466 U.S. 904, 104 S.Ct. 1678, 80 L.Ed.2d 153 (1984).

[20] The party seeking the contempt citation retains the ultimate burden of proof, but once he makes out a *prima facie* case, the burden of production shifts to the alleged contemnor, who must then come forward with evidence to show a present inability to comply that goes "beyond a mere assertion of inability and satisf[ies] his burden of production on the point by introducing evidence in support of his claim." *Hayes,* 722 F.2d at 725.

This burden is satisfied by making "in good faith all reasonable efforts to comply." *United States v. Rizzo,* 539 F.2d 458, 465 (5th Cir.1976). We construe this requirement strictly. "Even if the efforts he did make were 'substantial,' 'diligent' or 'in good faith,' . . . the fact that he did not make 'all reasonable efforts' establishes that [respondent] did not sufficiently rebut the . . . prima facie showing of contempt. The . . . use of a 'some effort' standard for measuring the strength of [the] defense [would be] an abuse of discretion." *Hayes,* 722 F.2d at 725 (citation omitted); *Hodgson v. Hotard,* 436 F.2d 1110, 1115 (5th Cir.1971).

[21] Under this high standard, the trial court was not in error. There is ample evidence to support the trial court's determination that the Trustees made a prima facie showing of noncompliance. Nor was there error in the district court's determination that appellants failed to meet their burden of production. The financial records they submitted were seriously inadequate. The income statements were unverified and based on the representations of Simmons, rather than on independent audits. Asset valuations were found to be significantly understated. Financial records were generally incomplete and

did not include current statements or tax returns. It may be that Simmons and Alan's in fact lack the present ability to pay the obligation of Ryan's. But their failure to make all reasonable efforts to demonstrate that fact for the court means they were properly held in contempt.

III.

The appeal from the November 13 order, No. 85-7743, was improperly brought. It is neither a final order of the trial court nor an order that will support an interlocutory appeal. Accordingly, it is DISMISSED.

As to the contention that the injunction issued was not in precise compliance with Rule 65, there is no reversible error because there was no prejudice and because appellants failed to object to the defect. Appellants knew of their obligations under the injunction and performed consistent with those obligations, at least in part, for three months. The November 25 entry of a civil money judgment was proper. The determination that Simmons is the *alter ego* and that Alan's is the successor to Ryan's was likewise properly made. Because appellants failed to meet their burden of persuasion on the question of present ability to pay, there is no reversible error. Thus, upon all of these questions, presented in the appeal of No. 85-7751, the judgment of the trial court is AFFIRMED. We must remand, however, the November 25 order of incarceration in order that the trial court may clarify its purpose in entering that order. If it sought to penalize lack of good faith compliance with its earlier orders then incarceration was proper; if the court sought, in whole or in part, to enforce a money judgment, then that order was improper. Accordingly, that portion of the trial court's order directing the incarceration of Simmons is VACATED and REMANDED for clarification or modification by the trial court in light of this opinion.

(Filed November 13, 1985)

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ALABAMA
JASPER DIVISION

HARRISON COMBS, et al.,	)	
Plaintiffs,	)	CIVIL ACTION
vs.	)	NUMBER
RYAN'S COAL COMPANY, INC.,	)	83-C-1904-J
Defendant.	)	

CONTEMPT CITATION

On January 14, 1985, this Court issued a Consent Decree, by whose terms the defendant Ryan's Coal Company, Inc., and "its heirs, assigns and successors" were ordered to (1) make contractual contributions to the United Mine Workers Health and Retirement funds as required by the current collective bargaining agreement with the United Mine Workers, and (2) satisfy a judgment note executed to the said health and pension fund trustees in the amount of $492,754.91, at the rate of $10,000.00 per month, commencing on January 1, 1985.

In October, the plaintiff trustees petitioned for an order holding the defendant in civil contempt for violation of the court's order. A hearing on the petition was held on November 8, 1985. Based on the evidence adduced

at the hearing, the Court makes the following Findings of Fact:

1. The defendant, Ryan's Coal Company, Inc., is the alter ego of George M. Simmons, its majority (80%) stockholder and chief executive officer.

2. Alan's Coal Sales, a partnership of which George M. Simmons is the general (80%) and managing partner is the assign and successor of Ryan's Coal Sales, Inc.

3. Between January and March, 1985, Ryan's Coal Company mined over 5,000 tons of coal. This coal was mined by classified bargaining unit employees.

4. Between January and June, 1985, Ryan's Coal Company had gross sales in the amount of $644,585.11.

5. Except for the initial $10,000.00 payment under the judgment note, George M. Simmons, as the chief executive officer of Ryan's Coal Company has failed to make any scheduled payment on the judgment note and he has totally failed to make contractual contributions to the funds based upon coal tonnage produced and employee hours worked.

6. The failure by George M. Simmons to make the payments and contributions required by this Court's Consent Decree was without good cause and/or legal excuse.

Based on these findings, it is ORDERED that George M. Simmons and Alan's Coal Sales be and they hereby are made parties-defendants to this cause; and it is further *ADJUDGED that GEORGE M. SIMMONS, individually and doing business as RYAN'S COAL COMPANY, INC. and ALAN'S COAL SALES are in CIVIL CONTEMPT* of the January 14, 1985 decree of this Court.

To coerce compliance by the contemnors with the decree of this Court it is ORDERED that:

1. On or before 5:00 P.M. of Friday, November 22, 1985, the defendants GEORGE M. SIMMONS, RYAN'S COAL COMPANY, INC., and ALAN'S COAL SALES, jointly and severally shall pay the plaintiffs Two Hundred Twenty-Six Thousand Four Hundred Eleven and 73/100 Dollars ($226,411.73). Said amount represents the delinquency due the plaintiffs through October 1, 1985, on the judgment note, and the principal and applicable interest due on delinquent contributions not covered by the judgment note but calculated as due and owing by the plaintiffs' accountant and undisputed by the contemnors.

2. On or before 5:00 P.M. of Friday, November 22, 1985, the defendants GEORGE M. SIMMONS, RYAN'S COAL COMPANY, INC., and ALAN'S COAL SALES, jointly and severally shall post a bond with good and sufficient surety in the amount of Five Hundred Thousand and no/100 Dollars ($500,000.00) in order to assure compliance with the balance of payments due under the judgment note.

3. Upon request by the plaintiffs, the contemnors shall submit to an audit to determine contributions due and owing for the period subsequent to March 31, 1985, and the contemnors shall pay plaintiffs any such amount determined by audit or in further proceedings before this Court in the event the parties dispute any amount due and owing.

4. Plaintiffs shall recover their costs, including a reasonable attorney's fee and accountant's fee, from Ryan's Coal Company, Inc., Alan's Coal Sales and George M. Simmons, jointly and severally, within thirty (30) days of the order awarding costs and fees.

Finally, it is ORDERED that commencing at 5:00 P.M. on Friday, November 22, 1985, at the Federal Courthouse in Birmingham, Alabama the Court shall conduct a hearing to determine:

(a) the amount of the attorney's and accountant's fees to be awarded to plaintiffs;

(b) the extent to which the contemnors have complied with the terms of this Contempt Citation, and

(c) the necessity of further, more drastic action by the Court to coerce compliance by the contemnors with its orders.

Contemnor George M. Simmons is hereby ORDERED to personally appear at the hearing.

The United States Marshal for the Northern District of Alabama shall personally serve a copy of this Contempt Citation on George M. Simmons at his office (Simmons Equipment Company, U. S. Highway 78 West, Graysville, Alabama) or his home (4900 Old Leeds Road, Birmingham, Alabama) address.

DONE this 13th day of November, 1985.

/s/ U. W. Clemon
United States District Judge
U. W. Clemon

(Filed November 22, 1985)

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ALABAMA
JASPER DIVISION

HARRISON COMBS, et al., Plaintiffs,	)	
vs.	)	CIVIL ACTION
RYAN'S COAL CO., INC., et al.,	)	NUMBER
Defendants.	)	83-C-1904-J

ORDER

The contemnors, George M. Simmons, individually, and doing business as Alan's Coal Sales and Ryan's Coal Company, Inc., and Ryan's Coal Company, Inc., having previously been adjudged in civil contempt of this Court by order dated November 13, 1985; and the Court having subsequently determined after an evidentiary hearing that the contemnors have failed to comply with the provisions of the aforesaid order without good cause or legal excuse therefor; in a further effort to coerce compliance with the previous orders of the Court,

IT IS ORDERED that the United States Marshal for the Northern District of Alabama shall FORTHWITH take GEORGE M. SIMMONS into custody for a period of

twenty-one (21) days, after which time he shall be released from custody. The said GEORGE M. SIMMONS may be released from custody at such shorter period of time as he demonstrates to the Court his willingness to make a good faith effort to comply with the prior orders of this Court.

DONE this 22d day of November, 1985.

/s/ U. W. Clemon
United States District Judge
U. W. Clemon

(Filed November 25, 1985)

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ALABAMA
JASPER DIVISION

HARRISON COMBS, et al., Plaintiffs,	)	CIVIL ACTION
vs.	)	NUMBER
RYAN'S COAL CO., Inc., et al., Defendants.	)	83-C-1904-J

FINAL JUDGMENT

Based on the Findings of Fact and Conclusions of Law dictated into the record at the end of the November 22, 1985 hearing, it is hereby

ORDERED, ADJUDGED and DECREED that plaintiffs HARRISON COMBS, JOHN J. O'CONNELL, and PAUL R. DEAN, as trustees of the UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS shall have and recover of defendants RYAN'S COAL COMPANY, INC., as *alter ego of* GEORGE M. SIMMONS and GEORGE M. SIMMONS, individually and doing business as ALAN'S COAL SALES, the sum of Seven Hundred Twenty-eight Thousand Three Hundred Ninety-five and 14/100 Dollars ($728,395.14).

Pursuant to FRCP 54(b), the Court determines that there is no just reason for delay. This judgment incorporates the indebtedness of Ryan's Coal Company and its *alter ego* to the plaintiffs under the terms of the Consent Decree previously entered herein, as well as the attorney's and accountant's fees assessed against the defendants based on their contemptuous conduct subsequent to the entry of the Consent Decree. Accordingly, the Court DIRECTS the ENTRY OF JUDGMENT in the aforesaid amount.

The costs of this action are hereby taxed against George M. Simmons, individually, for which execution shall issue.

DONE this 25th day of November, 1985.

/s/ U. W. Clemon
United States District Judge
U. W. Clemon

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ALABAMA

HARRISON COMBS, JOHN J. O'CONNELL and PAUL R. DEAN, as Trustees of the UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, Plaintiffs,	)	
vs.	)	CV83-C-1904-J
RYAN'S COAL COMPANY, INC., a corporation, et al., Defendants.	)	

APPEARANCES:

For the Plaintiffs:

Mr. Robert Stropp, Jr.
Attorney at Law
Birmingham, Alabama

For the Defendants:

Mr. William Mills
Attorney at Law
Birmingham, Alabama

CAPTION

THE ABOVE ENTITLED CAUSE came on to be heard before the Honorable U. W. Clemon, United States District Judge, at the United States District Courthouse,

Birmingham, Alabama, on the 22nd day of November, 1985, at 5:00 p.m. * * *.

* * *

* * * [86] was directed.

We again submit that there is an inability demonstrated by the evidence.

Thank you.

THE COURT: All right.

MR. STROPP: Could I make one closing remark?

THE COURT: Yes, sir.

MR. STROPP: We mentioned 54B certification. The reason for that was that we still have a continuing claim for hours to be accounted for, hours worked by classified employees after March 31, 1985. That's why we mentioned the 54B certification.

THE COURT: The Court will now dictate into the record its findings of fact and conclusions of law.

On November 13th, 1985, this Court issued a contempt citation to George M. Simmons, Ryan's Coal Company, Incorporated, and Alan's Coal Sales. To coerce compliance by the contemnors with the prior order of the Court, it required, that is the Court required the contemnors to pay to the plaintiffs two hundred and twenty-six thousand four hundred and eleven dollars and seventy-three cents by five o'clock today, Friday, November 22nd, 1985. It further required the contemnors to post a bond with good and sufficient surety in the amount of five hundred thousand dollars in order to assure compliance with the balance of [87] payments due under the judgment note executed by Ryan's Coal Company in January of this year.

The Court set a hearing for today to determine the amount of attorneys' and accountants' fees to be awarded to the plaintiff, the extent to which the contemnors have complied with the terms of the contempt citation, and the necessity of further action in the event of non compliance to coerce compliance with the Court's orders.

The Court finds that a reasonable attorneys' fee in the amount of seven thousand eight hundred and twenty-two dollars and fifty cents should be awarded to plaintiffs' counsel for their work in these proceedings.

It further finds that the plaintiff should be awarded one thousand four hundred and six dollars as a reasonable fee for the accountant services rendered in these proceedings.

The Court will therefore enter judgment in the amount of seven hundred and twenty-eight thousand, three hundred and ninety-five dollars and fourteen cents in favor of the plaintiffs and against the contemnors, George M. Simmons, individually, and Alan's Coal Sales and Ryan's Coal Company, Inc.

Since the November 13 hearing, Mr. Simmons has approached his insurance agency and it, in turn, has informed Mr. Simmons that it was not able to procure a bond in the amount of five [88] hundred thousand dollars.

The Court judicially notes that also since that time Mr. Simmons has changed lawyers and has filed a notice of appeal from the Court's order of November 13th which this Court did not consider to be a final order.

Mr. Simmons is a sole owner of Berry Mountain Mining Company, Incorporated. As of October 31, 1985, it had total assets of ten point two million dollars. It had total current liabilities of eight point six million dollars. Those

current liabilities do not obviously include liabilities owed to Mr. Simmons individually or long-term debts. Within the last thirty days, Berry Mountain Mining Company has had gross receipts of between two and three million dollars. Its disbursements were controlled exclusively by Mr. Simmons. It is a viable operation. The Court indulges in the assumption that the business would not continue operating if it were continuously losing money. It is a viable operation.

Mr. Simmons is also the sole stockholder of Simmons Equipment Company, Incorporated, and is its chief executive officer. Its most recent balance sheet was not presented to the Court and to the extent that the Defendant's Exhibit number 2, the statement of financial condition, purports to describe the financial condition of Simmons Equipment Company, that exhibit is not credited by the Court. The [89] Court finds that the financial condition of Simmons Equipment Company was, in fact, better than that of Berry Mountain Mining Company, and that it has maintained that position within the last thirty days.

Mr. Simmons and his wife own two thousand two hundred and six acres of farm property in St. Clair County, Alabama, and they are presently operating a cattle farm on that property. In addition, Mr. Simmons and his wife own a residence in Birmingham, Alabama, that is conservatively valued at, or valued in excess of a quarter of a million dollars.

Mr. Simmons has not submitted any audited statement reflecting his present financial condition and the Court infers that his failure to do so is attributable to the likelihood that such an audited financial statement would, if introduced, reflect a much better financial condition for

Mr. Simmons than the unaudited statement which is Defendant's Exhibit number 2.

Mr. Simmons has failed to introduce any of his most recent bank statements either for himself or for the companies which he owns and/or operates. The Court likewise infers from this failure to produce such evidence that had the statements been produced they would have shown a more favorable financial condition of Mr. Simmons than disclosed by his testimony and by the unaudited statement of financial condition submitted by his accountant.

[90] Plaintiff—I'm sorry, the defendant, Mr. Simmons, has a long-standing banking relationship with Central Bank of the South from which he has obtained several loans in the past. His personal banker is William J. Walker and he is a friend of Harry Brock, the president of Central Bank Shares. Mr. Simmons did not approach either Mr. Walker or Mr. Brock to determine whether Central Bank would consider extending to him a loan or loans sufficient in amount to pay the two hundred twenty-six thousand dollars that's due today. Not only did Mr. Simmons not approach his primary bank to arrange a loan so that he could comply with the Court order, he did not approach any other bank with whom he had or has had business relationships, and he did not approach any other lending institution in an effort to comply with the Court's order.

Based on the limited financial information which is in evidence, the Court concludes that had Mr. Simmons applied for a loan at Central Bank for a quarter of a million dollars that there is a substantial likelihood that the loan would have been granted in view of his considerable assets. Failure to apply for a loan demonstrates to the

Court a lack of a good-faith effort on the part of Mr. Simmons to comply with the Court's order.

Equally troublesome on this question of good-faith is the consideration that Mr. Simmons has had in his control [91] within the last thirty days between two and three million dollars. The failure on his part to consider using some of those funds which he controlled to pay off the two hundred and twenty-six thousand dollar obligation enunciated in the Court's November 13th order is an indication to the Court that there was not a good-faith effort on the part of Mr. Simmons to comply with the Court's order.

The statement of financial condition, Defendant's Exhibit number 2, is based on information supplied to the accountant by Mr. Simmons and the accountant has a disclaimer of any opinion or any form of assurance on the statement. Further, the statement is not given any weight by the Court based on the consideration that it is presented on the liquidation basis which differs from generally accepted accounting principles.

The Court's assessment of Mr. Simmons' testimony and its observation of his demeanor in the courtroom leads it to the conclusion that Mr. Simmons has not made a good-faith effort to comply with the Court's order. The Court expressly finds that Mr. Simmons has the present ability to comply with the order.

The Court concludes that Mr. Simmons' failure to comply with the November 13th order is without good cause or legal excuse.

As indicated earlier, the Court will enter a judgment [92] for the plaintiffs in the amount of seven hundred

twenty-eight thousand plus dollars and will make the necesssary certification under Rule 54B.

The Court must next consider what measures, if any, will coerce compliance by Mr. Simmons with the previous order of the Court. The Court has considered the propriety of imposing fine and it concludes that a fine would not be an efficacious means of insuring compliance. The Court will order the United States Marshal for the Northern District of Alabama to take Mr. Simmons into custody at the conclusion of this hearing. He will remain in their custody for twenty-one days or for such shorter period of time as he demonstrates to the Court his willingness to make a good-faith effort to comply with its orders. Whenever Mr. Simmons, through counsel, indicates to the Court, makes a showing that he will exert those good-faith efforts, then he will be released from custody; otherwise, he will remain in custody for twenty-one days.

Are there any questions?

MR. MILLS: Your Honor, we will file notice of appeal as soon as it's possible to do so.

THE COURT: Yes, sir.

MR. MILLS: We would orally at this time ask the Court to stay the order pending appeal.

THE COURT: The motion will be overruled.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7751

D.C. Docket No. 83-1904

HARRISON COMBS, JOHN J. O'CONNELL AND PAUL R. DEAN, AS TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS,

Plaintiffs-Appellees,

versus

RYAN'S COAL COMPANY, INC., A CORPORATION, GEORGE M. SIMMONS, AND ALAN'S COAL SALES,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Alabama

Before JOHNSON and HATCHETT, Circuit Judges, and ALAIMO*, Chief District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the orders of the District Court appealed from, in this cause be and the

*Honorable Anthony A. Alaimo, Chief U. S. District Judge for the Southern District of Georgia, sitting by designation.

same are hereby, AFFIRMED in part and VACATED in part; and that this cause be and the same is hereby, REMANDED to said District Court for clarification or modification in accordance with the opinion of this Court;

It is further ordered that defendants-appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: April 2, 1986

For the Court: Spencer D. Mercer, Clerk

By: /s/ (Illegible)
Deputy Clerk

ISSUED AS MANDATE: May 20 1986

UNITED STATES COURT OF APPEALS
Eleventh Circuit
Office of the Clerk
50 Spring Street SW
Atlanta, Georgia 30303-3147

Spencer D. Mercer
Clerk

in replying give number
of case and names
of parties

May 8, 1986

TO ALL PARTIES LISTED BELOW:

No. 85-7743 and 85-7751 COMBS v. RYAN'S COAL CO., et al.

This is to advise that an order has this day been entered denying the petition( ) for rehearing.

..... The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the petition( ) for rehearing en banc has also been denied.

XX No member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure, Eleventh Circuit Rule 26), the petition( ) for rehearing en banc has also been denied.

See Rule 41, F.R.A.P., and Eleventh Circuit Rule 27 for issuance and stay of the mandate.

Sincerely,

Spencer D. Mercer, Clerk
By: /s/ Sandra (Illegible)
Deputy Clerk

cc: William H. Mills, Esquire
Gerald L. Miller, Esquire
Robert Stropp, Jr. Esquire
Patrick K. Nakamura, Esquire